



## BRIEFING NOTE

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### Indigenous peoples, transnational corporations and other business enterprises

Over 370 million individuals worldwide are indigenous. Mostly inhabitants of developing countries, they represent more than 5,000 distinct peoples. Indigenous Peoples are particularly vulnerable to industrial development. They are among the poorest of the poor, not only because of their economic marginalisation but also because they are deprived of basic social, cultural and political rights and fundamental freedoms, including rights to their lands, territories and resources. Indigenous Peoples inhabit lands rich in natural resources. Consequently, they are strongly affected by the operations of national and transnational companies. At the same time, Indigenous Peoples' exclusion from political decision-making processes - locally, nationally, regionally and globally - places them in a position of extreme disadvantage vis-à-vis imposed industrial activities that affect their individual and communal lives, territories and resources. This is particularly evident in the case of the extractive sector.

It is estimated that as much as 50% of the gold produced between 1995 and 2015, and up to 70% of copper production by 2020, will take place on the territories of Indigenous Peoples.<sup>1</sup> In 2009, the European Commission noted that approximately 70% of the uranium used in nuclear reactors was sourced from the homelands of Indigenous Peoples worldwide.<sup>2</sup>

#### Business violations of Indigenous Peoples' rights

Innumerable studies, as well as Indigenous Peoples' testimonies, have documented serious human rights violations resulting from the activities of corporations on Indigenous Peoples' lands, including loss of, or damage to: indigenous lands, indigenous subsistence economies, and the health, language and cultural resources of indigenous



Munda people, Jharkhand - Photo: Chris Erni, IWGIA 2009

In 2007, the UN General Assembly adopted the **UN Declaration on the Rights of Indigenous Peoples**.<sup>3</sup> The UN Declaration is now the principal global legal framework for upholding and protecting the rights of Indigenous Peoples, including in their interactions with corporations seeking to operate within their territories, and with government authorities in the context of industrial development. The principle of Free, Prior and Informed Consent, established by the UN Declaration, is of central importance in the context of planned or actual corporate activities in or otherwise affecting Indigenous Peoples and their lands.



Kakadu Ranger Uranium Mine - Photo: Alberto Otero García

communities.<sup>4</sup> Research conducted by Prof. John Ruggie, the former UN Special Representative on Business and Human Rights, concluded that “the extractive sector – oil, gas, and mining – utterly dominates this sample of reported abuses”.<sup>5</sup>

In March 2009, Indigenous Peoples met in Manila, Philippines, for the International Conference on Extractive Industries and Indigenous Peoples. The meeting culminated in the *Manila Declaration*.

The Manila Declaration works within the framework of the Declaration on the Rights of Indigenous Peoples to assert that Indigenous Peoples are rights holders. More specifically, it calls for a review of all on-going projects that are approved without respect for indigenous Free, Prior and Informed Consent (FPIC) and Indigenous Peoples’ right to self-determination and requests that the relevant UN agencies

assist in the monitoring and provision of independent information in FPIC processes.

It requests that Prof. John Ruggie, and therefore by implication the Working Group on the issue of human rights and transnational corporations and other businesses, “actively engage with impacted indigenous communities through workshops addressing indigenous peoples’ rights and the extractive industry, and together with other UN procedures, bodies and agencies, promote the enactment of legislation in home states of transnational corporations that provides for extraterritorial jurisdiction in relation to their activities”. Given the reality of continuing, extreme abuses of Indigenous Peoples’ human rights connected with company activities, there is an urgent need for the UN Working Group to focus attention explicitly on the situation of Indigenous Peoples, and to develop informed recommendations to address this.

### Rio Tinto in Kakadu, Australia

The traditional estate of the Mirarr people lies within the bounds of the World Heritage-listed Kakadu National Park in the Northern Territory, Australia.

The Ranger Uranium Mine was imposed on traditional owners when the 1977 Ranger Uranium Environmental Inquiry acknowledged that the Mirarr opposed the mine but determined that “their opposition should not be allowed to prevail”. Mining began at Ranger in 1981. Today it is the second largest uranium mine in the world and supplies around 10 per cent of the global uranium market. Recurring water and tailings management problems have plagued the mine and contaminated water regularly leaks into the

adjacent Kakadu National Park. Hundreds of spills, leaks and license breaches have been recorded since Ranger opened and the mine has contributed to growing social problems in the region. In January 1998, the European Parliament passed a resolution in support of the Mirarr and their struggle against uranium mining on their country. This resolution calls on Member States to ban all imports of uranium from mines where the land rights of indigenous people are compromised. It also calls for the establishment of an independent study into the imports of EU Member States, analysing the impacts of uranium mining and processing on the health, environment and rights of indigenous people.<sup>6</sup>

## UN focus on corporate impacts on Indigenous Peoples' rights

The UN has established a number of mechanisms that uphold and support the human rights of Indigenous Peoples, including:

- UN Permanent Forum on Indigenous Issues (UNPFII)
- UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
- UN Special Rapporteur on Indigenous Peoples

These mechanisms have consistently and increasingly documented the negative impacts of corporate activities on Indigenous Peoples' human rights.

### UNPFII Study on Indigenous Peoples and corporations

In 2007, the UN Permanent Forum on Indigenous Issues appointed three of its members as Special Rapporteurs to conduct a study on Indigenous Peoples and corporations. The resulting "*Study on indigenous peoples and corporations to examine existing mechanisms and policies related to corporations and indigenous peoples and to identify good practices*" was submitted to the UN Permanent Forum on Indigenous Issues in May 2011.<sup>7</sup>

The study included recommendations on assessing impacts and programs and systematizing good corporate practices, on the issue of indigenous participation in regulatory frameworks and FPIC, and on establishing a ranking of corporations, etc.

Furthermore, it requested that the Special Rapporteur on the Rights of Indigenous Peoples include a chapter in his annual report on analysing and evalu-

ating the corporate practices of business enterprises and their positive and negative impacts on indigenous peoples and their lands.

### Special Rapporteur's Report on the impact of the extractive industry

The report of the UN Special Rapporteur on the Rights of Indigenous Peoples, Prof. James Anaya, presented to the 18<sup>th</sup> session of the UN Human Rights Council on 20 September 2011, focused on the impact of the extractive industries. During an interactive dialogue with the UN Human Rights Council, the Special Rapporteur was encouraged by states to further elaborate on his findings and pinpoint solutions to the problems identified. The Special Rapporteur has subsequently announced that he will concentrate his attention in the next three years of his mandate on the impact of the extractive sector on Indigenous Peoples and the rights of Indigenous Peoples.<sup>8</sup>

### EMRIP study on indigenous peoples' right to participate in decision-making

In 2011, the UN EMRIP also presented its *Final report of the Study on indigenous peoples and the right to participate in decision-making*<sup>9</sup> to the UN Human Rights Council. Included in this report is the Expert Mechanism's *Advice No.2 (2011): Indigenous peoples and the right to participate in decision-making*.<sup>10</sup> This study is of particular value to discussions on Indigenous Peoples' rights in relation to multinational corporations and other businesses. At its 4<sup>th</sup> session, in 2001, the UN EMRIP proposed continuing its work on Indigenous Peoples' right to participate in decision-making, focusing in particular on the extractive sector, in co-



EMRIP 2nd session - Photo: Alejandro Parellada, IWGLIA



operation with the UN Special Rapporteur.

At its 18<sup>th</sup> Session, in 2011, the UN Human Rights Council adopted Resolution 18/8 entitled Human Rights and Indigenous Peoples, approving the two reports mentioned above and giving further instructions to the mandate holders.

### Other relevant UN bodies and instruments

Other UN bodies and instruments that are important in the context of Indigenous Peoples' rights are:

- ILO Convention No. 169, which recognizes and protects the human rights of Indigenous Peoples, particularly with regard to land rights, including the right to natural resources on Indigenous Peoples' land.
- The UN Committee on the Elimination of Racial Discrimination (CERD Committee), which, in its General Recommendation No. 23, places special emphasis on the rights of Indigenous Peoples "to own, develop, control and use their communal

lands, territories and resources...".<sup>11</sup>

- Human rights treaty monitoring bodies (CERD, CESCR, UPR, etc.) that have addressed the effects on Indigenous Peoples' rights during the course of periodic monitoring of states and via the consideration of individual and collective complaints.
- The World Bank Group announced a review of its Safeguard Policy on 15 November 2010. This presents an opportunity, not least, to incorporate human rights issues into its safeguards policies (which is something the Bank has resisted to date), and an opportunity for the Bank to revise its policy in order to bring it into line with the UN-DRIP. There is, however, serious concern that the Indigenous Peoples' Policy may be incorporated into a broader social safeguard policy instead of being retained as a stand-alone policy for indigenous peoples.<sup>12</sup>
- In June 2011, the OECD adopted revised Guidelines for Multinational Enterprises. For the first time, the Guidelines now include a chapter on human rights and mentions Indigenous Peoples.

### Vedanta in Orissa, India

The Nyamgiri Mountain is regarded by local tribal inhabitants as Nyam Raja – roughly translated as "Lord of the Law" or "Lord of Dharma". There have been plans to mine the hills for bauxite since 1997, latterly by UK-registered mining company, Vedanta Resources.

In September 2005, an inquiry by a leading advisory committee to India's Supreme Court (the Central Empowered Committee, or CEC) concluded that Vedanta had, *inter alia*, "falsified information" to obtain environmental clearances for the alumina refinery being constructed on plains below the mountain. The company had also destroyed more than ten hectares of forest land. The CEC urged that the mining venture be rejected on environmental grounds, and also because it would violate the constitutional rights of the Kondh people.

Despite the CEC's forthright recommendation, Vedanta continued to battle to get the mining project passed. Meanwhile, many Khond rose up in vociferous opposition to what they perceived as an unprecedented threat to their land and livelihoods.

In September 2009, the UK-based tribal peoples' campaign group, Survival International, submitted a complaint with regard to Vedanta's activities around Lanjigarh to the British government's National Contact Point (NCP) for a ruling under guidelines set by the OECD for the conduct of multinational corporations.

The NCP ruled that Vedanta "did not respect the rights of the Dongria Kondh"; did not "consider the impact of the construction of the mine on the [tribe's] rights"; and that it "failed to put in place an adequate and timely consultation mechanism".

In February 2010, Amnesty International published detailed allegations about the company's social and environmental violations in the Lanjigarh area, which it has neglected to answer. Finally, in August 2010, a high-level independent report, commissioned by India's Ministry of Environment and Forests (MoEF), unequivocally rejected the Nymgiri mining project and also urged a halt to Vedanta's planned six-fold expansion of its Lanjigarh refinery.

At the time of writing, Vedanta is trying to get this ruling overturned through India's Supreme Court. However, in the past two months, further evidence of mismanagement at the refinery has emerged, specifically relating to involuntary (and illegal) on-site releases of highly alkaline toxic solid wastes, commonly known as "red mud".

Recently, the Indian National Human Rights Commission identified 3.66 acres of land within the refinery that it said legally belonged to the tribal Khond, as a result of which the local administration registered a land grab case against Vedanta.

## The UN Working Group on the issue of human rights and transnational corporations and other business enterprises

In June 2011, after an 8-year long process, the UN Human Rights Council adopted its “three pillar” framework on business and human rights, addressing the responsibilities of both governments and the private sector.

At the same time, via Resolution 17/4, on 16 June 2011, the Human Rights Council agreed to establish

the UN Working Group on the issue of human rights and transnational corporations and other business enterprises.

The issue of the impact of corporations on the human rights of Indigenous Peoples is now higher up the multilateral agenda than ever.

### Recommendations

In this context, and taking into consideration the mandate of the Working Group under Human Rights Council Resolution 17/4, we recommend that the UN Working Group:

- seek and receive information from Indigenous rights-holders.
- adopt a working procedure that facilitates the inclusion of reports and testimony from Indigenous Peoples and others directly affected by corporate activities, as well as from corporations, NGOs and academic experts.
- explicitly identify a focus on and develop informed recommendations to address the impacts of business activities on Indigenous Peoples.
- adhere to and fully respect Indigenous Peoples’ rights, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, whenever providing advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights.
- take special consideration of the situation of Indigenous Peoples during country visits;
- wherever relevant, raise Indigenous Peoples’ rights in the course of communications, with governments, companies, intergovernmental organizations, international financial institutions and other actors;
- take appropriate steps to raise any situation of actual or threatened abuse of Indigenous Peoples’ rights due to company activities that may be drawn to its attention with the relevant actor and/or authorities.
- develop a regular dialogue with Indigenous organizations to learn more about the challenges Indigenous Peoples face and the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples;
- develop a regular dialogue with the relevant UN bodies and specialized agencies, funds and programs dealing with the situation of Indigenous Peoples and Indigenous Peoples’ rights, such as the UNPFII, the EMRIP and the UN Special Rapporteur and others, and to take full account of their authoritative findings and reports. The UN Working Group should further take full account of materials from the former UN Working Group on Indigenous Populations, the CERD and other bodies within the UN system when addressing any issue of controversial interaction between Indigenous Peoples and corporations.<sup>13</sup>
- engage with the World Bank on its on-going Safeguard Policy review, notably to strengthen the safeguards in line with key indigenous demands.

### References

- 1 Moody, Roger (1996). *The lure of gold: how golden is the future?*, Panos briefing no. 19. Panos Institute; May 1996; Moody, R. (2001). “Presentation to the Communities Confronting Mining” Corporations Seminar, London, England, May 2001.
- 2 *Letter from Gundjeilmi Aboriginal Corporation to UN Secretary General, April 2011.*
- 3 UN Declaration on the Rights of Indigenous Peoples. Adopted by the General Assembly, 13 September 2007 with 144 votes in favor, 4 against and 11 abstentions.
- 4 See, for example, International Work Group for Indigenous Affairs (2011). *The Indigenous World 2011*. Copenhagen: IWGIA Available for purchase or download at <http://www.iwgia.org/publications/series/yearbook-the-indigenous-world>
- 5 *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/2006/97.
- 6 Full resolution text available here: <http://www.mirarr.net/docs/Euro-Parliament.pdf>.
- 7 UN Doc. E/C.19/2011/12
- 8 Report of the UN Special Rapporteur on the rights of indigenous peoples, James Anaya. *Extractive industries operating within or near indigenous territories*. UN Doc. A/HRC/18/
- 9 UN Doc. A/HRC/18/42
- 10 [http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2\\_Oct2011.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf)
- 11 “General Recommendation No. 23: Indigenous Peoples”: 18-08-1997. Gen. Rec. No. 23. (General Comments).
- 12 Open letter to the World Bank from indigenous peoples, 17 October 2011.
- 13 For further recommendations, see also: “Recommendations from Indigenous Peoples’ Links (PIPLinks) to the Working Group on the Establishment of a Work Program”, 8 December 2011.